United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1326

To be argued by
MICHAEL YOUNG

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

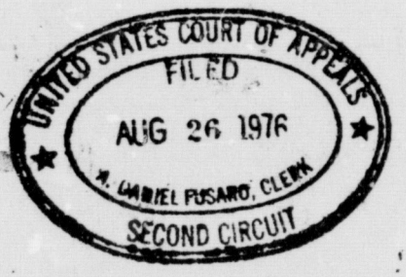
JOSEPH SEILLER,

Appellant.

Docket No. 76-1326

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY,
Attorney for Appellant
JOSEPH SEILLER
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG,
of Counsel.

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ON A APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether Judge Cooper's emotional involvement in this case and his personal acrimony against appellant Seiller prevented him from exercising his judicial discretion and induced him to rely on improper factors in imposing sentence.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Irving Ben Cooper) entered June 23,1976, convicting appellant Seiller, pursuant to a plea of guilty, of one count of conspiracy to transport stolen securities in foreign commerce, in violation of 18 U.S.C. §2314. Appellant was sentenced to three years imprisonment.

The Federal Defender Appeals Unit of the Legal Aid Society was continued on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Prior Proceedings

On June 23,1971, two indictments were filed in the Southern District of New York against appellant Seiller and others. Indictment 71 Cr. 676 contained two counts, charging appellant Seiller and others with transporting stolen securities valued at $5000 or more in foreign commerce, in violation of 18 U.S.C. §2314 (count two), and with conspiracy to do the same, in violation of 18 U.S.C. §2(count one). Indictment 71 Cr. 675 contained three counts, charging appellant Seiller and another

defendant with transporting stolen securities in foreign commerce (count two) and conspiring to do so (count one), and charging appellant Seiller and others with a separate conspiracy to transport stolen securities in foreign commerce (count three).

On May 1,1972, Judge Cooper accepted appellant Seiller's pleas of guilty to the three conspiracy counts contained in these two indictments.

On January 11,1973, prior to sentencing, an application was filed in Dr. Seiller's behalf to withdraw his guilty pleas, pursuant to Rule 32(d), Federal Rules of Criminal Proceedure.[FN1] In this application, appellant Seiller asserted that because he was a foreigner not versed in American law, because English was not his native language, and because he was seriously ill at the time of the plea proceedings, he had not understood the nature of the charges when he pleaded guilty. He further explained that he was in fact innocent of those charges, and that there was no factual basis for his guilty pleas. Rather, he asserted that he had pleaded guilty under the mistaken belief that he was guilty of the conspiracies charged if he merely introduced the parties who later transacted in stolen securities, without his knowing that the intended transaction was illegal.

FN1 - Appellant Seiller's Rule 32(d) motion is set forth as D of appellant's separate appendix.

Judge Cooper denied this application, finding that appellant Seiller had understood the nature of the charges when he pleaded guilty.[FN2]

On March 21,1973, appellant Seiller was sentenced to three years' incarceration on each of the three conspiracy counts, sentences to run concurrently.

On April 9,1974, appellant Seiller filed a motion to vacate his judgment and sentence pursuant to 28 U.S.C. §2255.[FN3] In that application, appellant Seiller again asserted that he had not understood the nature of the charges and was in fact innocent of them.

Judge Cooper denied appellant Seiller's application without a hearing, stating that it was "baseless and completely without factual support."[FN4]

On December 1,1975, this Court reversed Judge Cooper's denial, and set aside the pleas of guilty as to two of the counts. Seiller v. United States, slip op. 6509 (2d Cir. Doc. No.75-2002, December 1,1975)[FN5] The Court affirmed as to the third

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FN2 - Judge Cooper's Memorandum of January 24,1973, denying appellant Seiller's Rule 32(d) motion is set forth as E of appellant's separate appendix.

FN3 - Appellant Seiller's §2255 application is set forth as F, the government's response as G, and appellant's reply as H of appellant's separate appendix.

FN4 - Judge Cooper's memorandum denying appellant Seiller's §2255 application is set forth as I of appellant's separate appendix.

FN5 - The opinion of the Court of Appeals is set forth as J of appellant's separate appendix.

count, but remanded for resentencing on that count. In so doing, the majority, in an opinion written by Judge Mulligan, found that the record contained no factual basis for the two pleas it set aside, and that appellant Seiller had entered his pleas of guilty to those counts without understanding the nature of the crimes charged:

> The record before us persuades me that Seiller's responses to Judge Cooper's questioning.... demonstrate a denial of criminal intent and therefore a tacit assertion of innocence rather than guilt. The conduct Seiller admitted to was without criminal intent and his admission of guilt therefore only indicates his misunderstanding of the crime charged.
>
> Id.,slip op. at 6538

The majority found that the record established that appellant Seiller pleaded guilty under the mistaken impression that he could be guilty of the conspiracies charged if he merely introduced the parties who later engaged in the illegal transactions, without his knowing that the anticipated transactions were in fact illegal:

> [The record] established, to me at least, from Seiller's responses that he considered that his introduction of those who were selling securities not then known to him to be stolen made him a member of a conspiracy to violate 18 U.S.C. §2314. If that was his understanding, then the plea of guilty should have been rejected.
>
> Id.,slip op. at 6539

B. The Basis for the Present Appeal

The resentencing ordered by the Court of Appeals was held on June 23,1976. Prior to that proceeding, defense counsel filed a sentencing memorandum requesting that the court sentence appellant Seiller on the single remaining count to one and one-half years, the time he had already served.[FN6]

At the commencement of the proceedings on June 23rd,[FN7] appellant Seiller entered pleas of not guilty to the two counts which had been vacated by the Court of Appeals. (2-3).[FN8] The District Court then proceeded to hear arguments as to sentencing on the remaining conviction.

Counsel for the government declined to recommend any sentence but advised the Court that the Immigration and Naturalization Service had lodged a detainer against appellant Seiller, and that INS intended to seek to deport him as an alien who had overstayed his visa in this country. (4). The government then suggested that the Court might elect to suspend sentence on the condition that appellant Seiller agree voluntarily to leave the country (4).

Counsel for appellant Seiller stated that such a

FN6- Defense counsel's sentencing memorandum is set forth as K of appellant's separate appendix.

FN7 -The transcript of the entire sentencing proceeding is set forth as C of appellant's separate appendix.

FN8 -Numbers in parentheses refer to pages of the transcript of the sentencing proceeding, appellant's separate appendix at C.

condition was agreeable to the appellant if he could be allowed ninety days to take care of a pending divorce proceeding by his wife and certain other affairs before departing.(5-6).

In support of appellant Seiller's request to be sentenced to time served, defense counsel called the court's attention to the fact that appellant had now been incarcerated continuously for three and one-half years, two years in state prison for a related charge, and one and one-half years in federal prison on the charge on which he was now being resentenced. Moreover, this incarceration had been rendered more onerous than for the normal prisoner by virtue of the appellant's medical condition. Appellant Seiller has been suffering a vascular spasm, which produces vertigo, loss of equilibrium, nausea, and vomiting, and which requires him to use two canes or a wheel chair to get around.(6). Indeed, most of the time that he was incarcerated, he was held in hospital units because his condition prevented him from living in the normal population areas of the prisons.(7). Moreover, in addition to his incarceration, it appeared that appellant Seiller would be further punished by deportation from the country and by the probable loss of his wife and daughter through the pending divorce proceedings.(7).

On the positive side, defense counsel reminded the court that it had received numerous letters from prominent

persons attesting to the defendant's attributes and urging leniency in sentencing. Moreover, the appellant had been awarded membership in the Knights of Malta. Finally, as letters submitted to the court by prison officials attested, appellant's record while incarcerated had been exemplary. Indeed, he had recently saved the life of a fellow inmate who had attempted to commit suicide by hanging himself in his cell.(8).

At the conclusion of defense counsel's statement, Judge Cooper commenced a lengthy and emotional statement concerning the appellant. The Court of Appeals, in reversing Judge Cooper's denial of appellant Seiller's §2255 application, had found that appellant Seiller had not understood the nature of the charges when he pleaded to two of the counts, and that the circumstances he had described relating to those two counts in fact indicated that he was innocent of those charges. Disregarding these findings, Judge Cooper asserted that the defendant had really understood the nature of the charges, but had perpetrated a fraud on the district court at the plea proceeding, and then had further defrauded both the District Court and the Court of Appeals in his application

to have those guilty pleas set aside. Concerning the plea proceeding, Judge Cooper stated:

> And as often happens when the crucial words were mentioned, this defendant ducked. He fenced. And I was aware of it.
>
> (10)
>
> * * *
>
> With one breath you say "I am guilty, I understand the charge, I have great faith in my lawyer, I have talked with him at length, everything he said to me I understood, I withheld absolutely nothing from him."
>
> And then in the next breath, play around with the words.
>
> (11)

Concerning appellant's applications to have his guilty pleas set aside, Judge Cooper Stated:

> ...I feel today the same way that I felt when I wrote this last memorandum of January 24 1973. [In which the judge rejected the appellant's first application under Rule 32(d) to have his guilty pleas set aside on the ground that he had pleaded without requisite understanding of the nature of the charges]
>
> (14)
>
> * * *

That [Rule 32(d) application] was another example where he [the appellant] tried to put over a fast one. He thought the judge had not observed and had not made an estimate that he was nothing but a faker,[FN9] and a clever one at that.

(22)

This is Mr. Fraud. This is Mr. Operator. A man who claims that everybody set upon him and he is the victim, not the culprit, not the offender. The judge is condemned. The Assistant United States Attorney is condemned. Everybody is condemned.

(14-15)

He is the one who has been outraged. He is the one who has been sinned against but he never sinned.

That may be a line that can cast upon those who have not got the ability to respond, but the judge thinks he has the ability to respond, and he is responding now.

(15)

FN9 - Immediately prior to making this statement, Judge Cooper quoted at length from his memorandum of January 24,1973. However, he erroneously described this memorandum as the denial of a motion to reduce sentence rather than what it actually was, the denial of appellant Seiller's first application to set aside his guilty pleas.(21).

Judge Cooper also sought to analogize appellant Seiller to other defendants who had admitted their guilt, implying that appellant was equally as guilty as they on the counts which had been set aside:

> What I should have done [at the original plea proceeding] is to say to Seiller: I'm not satisfied the way you put it. Go to trial or I'll put this over for a week. Make up your mind what you really want to say to the Court...there has been a number of occasions since [the decision of the Court of Appeals in this case] when defendants, as very often is the case, begin to equivocate when it comes to such words as "I knew that the securities had been stolen," or "I knew this" or I knew that." Everything else they concede but when it comes to that particular word or its equivalent, they shy away from it. And what I have done since is to say, "I cannot accept your plea. I am not satisfied. Go to trial." And without exception, they have asked the Court to put it over for another day or two to give further consideration to the plea, and I have acquiesced, and in every single case, they have come forward with a veritable cataract of disclosure.
>
> (12)

Judge Cooper further stated that he would rely on the vacated counts in imposing sentence on the remaining count:

> ...and so while I have set aside your plea in two counts, there is nothing now that I come to sentence you on the third count to prevent me from recognizing a not guilty plea to two other counts and the additional information that I have which came from your lips before me with regard to those two counts in connection with which two counts you have entered a plea of not guilty.
>
> (17)

In fact, this Court found that appellant Seiller's statements amounted to an assertion of innocence as to those two counts.

Judge Cooper also referred repeatedly to the fact that the defendant had not expressed remorse:

> In the letter already marked in, evidence, the detailed letter by the defendant, there isn't even an avowal, to say nothing of a word or a phrase or a sentence of contrition. Not at all. Nothing.
>
> (15)
>
> * * *
>
> I am not dealing with someone who has offended the law and who comes in and asks for forgiveness and goes through an overwhelming recital or demonstration of contrition with the enormity of his offense and willing to make amends --"help me -- we have no such person here.
>
> (16)
>
> * * *

> The point I am emphasizing is that ever since we dealt with this defendant on the prior occasion, not a single word has come from him in which he has shown contrition even with respect to what he did as to the count in connection which we are now about to impose sentence.
>
> (22)

Furthermore, although the defendant had not engaged in any criminal activity, and indeed had had an exemplary prison record since the original sentencing proceeding, Judge Cooper stated:

> I'm not bound by any sentence heretofore imposed in count 3. I can give the maximum if I choose to in the light of what has been brought to my attention since the appearance of the defendant.
>
> (23)

Concerning the original sentencing proceeding, Judge Cooper stated that he had not responded to appellant Seiller's assertion of his innocence at that time:

> ...for the reasons I have already assigned. Something you really would not understand. And that is sympathy. It put restrictions on my tongue and therefore you felt that the judge was an imbecile, unaware, and that you could use me and put upon me the way you have and gotten away with it.
>
> (15)

In fact, appellant Seiller's application had not challenged the original sentencing proceeding but only his plea proceeding. Similar statements occurred throughout the resentencing proceedings:

> I am afraid that's where you led yourself off the sensible path, Mister. You thought that just because I didn't give you line for line everything that was operating in my mind with regard to you that therefore you had fooled me.
>
> (18)

* * *

> I am quite positive that if under the same circumstances our positions were reversed, Seiller, you would in sentencing, give the maximum in the light of all that's been recited, but the fact that you don't understand sympathy doesn't deter me from exercising it. The fact that you don't appreciate or evaluate these attributes of higher civilized deportment shouldn't make any impression upon me and it doesn't.
>
> (25-6)

* * *

Even the judge's evaluation of the appellant's character and conduct were permeated with inappropriately hostile statements. In addition to calling him "Mr. Fraud,"(14) and "Mr. Operator"(14), the judge said appellant was "a veritable kreuger"(16), "a fraud, a manipulator, a faker, a conniver"(21) and "a faker"(22).

Judge Cooper also referred to a portion of a letter which appellant Miller had sent to the Judge, stating,"I want to leave this country of false slogans and with people I am unable to understand." Concerning this comment, the judge stated:

> He had a right to say it but to say that this doesn't sum up his attitude toward the country that gave him asylum is to close one's eyes and I don't intend to do it.
>
> (25)
>
> * * *
>
> And in another place, his condescension, the habit he has of waivng aside as of small consequence, according to his superior intellect, what is presented to him. He made a similar comment with regard to America.
>
> (25)

After making note of the appellant's past record and an unsubstantiated claim in the presentence report that appellant had used "heavy-handed attempts" to encourage the INS to approve his application for resident alien status (18-21), Judge Cooper reimposed the same three year sentence on the remaining count which he had originally imposed when appellant stood convicted of three counts. The court then stated that it would entertain a motion to reduce the sentence to time served, if and when the appellant agreed to leave the country immediately(26). Finally, Judge Cooper refused to decide the government's motion to dismiss the remaining two counts(28-9). As of the date of the filing of this brief, the court has still not decided that motion.

ARGUMENT

JUDGE COOPER'S RELIANCE ON IMPROPER FACTORS AND HIS PERSONAL ACRIMONY TOWARD APPELLANT SEILLER PREVENTED THE PROPER EXERCISE OF HIS JUDICIAL DISCRETION AND OTHERWISE VIOLATED APPELLANT'S RIGHTS AT SENTENCING.

In 1972, Judge Cooper accepted pleas of guilty from appellant Seiller to three charges of conspiracy to transport stolen securities in foreign commerce. After entry of those pleas, appellant Seiller sought, through a Rule 32(d) application before sentencing and a §2255 application after sentencing to have his guilty pleas set aside. In those applications appellant asserted that because he was a foreigner not versed in American law, because English was not his native language, and because he was seriously ill at the time of the plea proceedings, he had not understood the nature of the charges when he pleaded guilty. Rather, he had believed that he was guilty of the conspiracies charged merely because he had introduced the parties who later engaged in the charged securities transactions, without knowing that those transactions would be illegal. Thus, he was in fact, innocent of the charges to which he had pleaded guilty.

Judge Cooper denied both applications, insisting in each instance that appellant Seiller had indeed understood the nature of the charges when he pleaded.

On appeal, this Court reversed Judge Cooper's denial of the §2255 application as to two of the three counts, holding that appellant Seiller's statements at the plea proceeding constituted an assertion of innocence rather than guilt as to those charges, and indicated that he had pleaded guilty without the requisite understanding of the essential elements of those crimes:

> The record before us persuades me that Seiller's responses to Judge Cooper's questioning . . . demonstrate a denial of criminal intent and therefore a tacit assertion of innocence rather than guilt. The conduct Seiller admitted to was without criminal intent and his admission of guilt therefore only indicates his misunderstanding of the crime charged.
>
> (Seiller v. United States, supra, slip op. at 6538)

This Court further found that the record substantiated appellant's claim that he had pleaded guilty under the mistaken impression that he could be guilty of the conspiracies charged if he merely introduced the parties who later engaged in the securities transactions, without knowing that those transactions would be illegal:

> [The record] established, to me at least, from Seiller's responses that he considered that his introduction of those who were selling securities not then known to him to be stolen made him a member of a conspiracy to violate 18 U.S.C. §2314. If that was his understanding, then the plea of guilty should have been rejected.
>
> (Id., slip op. at 6539)

This Court therefore set aside the guilty pleas to those two counts. Although affirming the plea to the third count, the Court remanded for resentencing on that count.

At the resentencing proceeding, Judge Cooper embarked upon a lengthy and emotional diatribe against appellant Seiller, accusing him of perpetrating a fraud on the district court and this Court by exercising his right to challenge the validity of his guilty pleas. Judge Cooper also accused the appellant of regarding the Judge as an "imbecile," called the appellant derogatory names, stated that in resentencing the appellant the Judge would consider the pleas which had been held by this Court to be invalid, and otherwise established that he was relying on improper factors and injudicious passions in resentencing the appellant. In the interests of justice, the sentence so imposed must be set aside and the case remanded for resentencing by a different judge.

A. The accusation that appellant Seiller had perpetrated a fraud on the district court and this Court by challenging the validity of his guilty pleas.

This Court, in setting aside appellant Seiller's two guilty pleas, found that the record established that he had not understood the nature of the charges, and had in fact, asserted his innocence rather than his guilt as to two of the counts at the plea proceedings. At the resentencing,

Judge Cooper accused appellant Seiller of perpetrating a fraud on the district court and this Court in order to get his gulty pleas set aside.

Concerning the original plea proceeding, Judge Cooper accused the appellant of "duck[ing]" and "fenc[ing]" in an attempt to deceive the court by refusing to admit what the court knew he was really guilty of:

> And as often happens when the crucial words were mentioned, this defendant ducked. He fenced. And I was aware of it . . .
>
> (10)
>
> * * *
>
> . . . With one breath you say, "I am guilty, I understand the charge, I have great faith in my lawyer, I have talked with him at length, everything he said to me I understood, I withheld absolutely nothing from him."
>
> And then in the next breath, play around with the words.
>
> (11)

Moments later, Judge Cooper attempted to analogize appellant Seiller to defendants who had at first equivocated, but eventually admitted their guilt. By this analogy the Judge implied that as to the counts which this Court had set aside, appellant was equally as guilty as those defendant:

> What I should have done [at the original plea proceeding] is to say to Seiller: I'm not satisfied the way you put it. Go to trial or I'll put this over for a week. Make up your mind what you really want to say to the Court . . . there has been a number of occasions since [the decision of the Court of Appeals in this case] when defendants, as very often is the case, begin to equivocate when it comes

> to such words as "I knew that the securities had been stolen," or "I knew this" or "I knew that." Everything else they concede but when it comes to that particular word or its equivalent, they shy away from it. And what I have done since is to say, "I cannot accept your plea. I am not satisfied. Go to trial." And without exception, without exception, they have asked the Court to put it over for another day or two to give further consideration to the plea, and I have acquiesced, and in every single case, they have come forward with a veritable cataract of disclosure.
>
> (12)

These statements indicate that Judge Cooper still believed that appellant Seiller was guilty of the charges which had been vacated, and that his pleas had been set aside because he had intentionally deceived the district court at the time of the plea, by denying an element of the crime.

Judge Cooper also made clear his belief that appellant Seiller's effort to have his guilty pleas set aside constituted further perpetuation of this fraud. Concerning appellant Seiller's first application to set aside his guilty pleas on the ground that he had not understood the nature of the charges, Judge Cooper said:

> That was another example where he [the appellant] tried to put over a fast one. He though the judge had not observed and had not made an estimate that he was nothing but a faker and a clever one at that.[10]
>
> (22)

---

[10] Immediately prior to making this statement, Judge Cooper quoted at length from his memorandum of January 24, 1973. He erroneously described this memorandum, however, as the denial of a motion to reduce sentence rather than what it actually was, the denial of appellant Seiller's first application to set aside his guilty pleas. (21).

As to appellant Seiller's insistence, in this applications to have his guilty pleas set aside, that he was innocent of the charges, Judge Cooper became even more emotional:

> This is Mr. Fraud. This is Mr. Operator. A man who claims that everybody has set upon him and he is the victim, not the culprit, not the offender. The judge is condemned. The Assistant United States Attorney is condemned. Everybody is condemned.
>
> (14-15)

And again, referring to similar claims as to the invalidity of his guilty pleas which appellant had made in a letter to Judge Cooper, the Judge exclaimed sarcastically:

> He is the one who has been outraged. He is the one who has been sinned against but he never sinned.
>
> That may be a line that you can cast upon those who have not got the ability to respond, but the Judge thinks he has the ability to respond, and he is responding now.
>
> (15)

Finally, Judge Cooper was unequivocal in declaring that he rejected the finding of the Court of Appeals that appellant Seiller had pleaded on the basis of a misunderstanding of the crimes charged.[11] Referring to his memorandum denying appellant Seiller's first attempt to have his guilty pleas set aside on that ground, Judge Cooper declared:

> I feel today the same way that I felt when I wrote this last memorandum of January 24, 1973.
>
> (14)

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[11] Although Judge Cooper stated that he agreed with this Court's finding that he had taken a technically "imperfect plea" (11), he was adament in rejecting this Court's finding that appellant had pleaded guilty under a misconception as to the nature of the charges (14).

Through these statements, Judge Cooper made emphatically clear his belief that appellant Seiller, by seeking to have his guilty pleas set aside, had perpetrated a fraud on the federal courts. This view was clearly rejected by this Court when it found the defendant's claims to be meritorious, and reversed Judge Cooper on two of the three counts. For this Judge intransigently to cling to this theory of fraud after the Court of Appeals decision was clearly improper. His reliance on that alleged "fraud" as a factor to be considered in resentencing was an abuse of his sentencing discretion. Cf. United States v. Duhart, 496 F.2d 941 (9th Cir. 1974).

Moreover, a defendant who successfully pursues a §2255 application must not be forced to do so at the risk that the district court which initially denied that application will treat that defendant's exercise of his legal and constitutional rights as a "fraud" to be held against the defendant in subsequent proceedings. The chilling effect that such improper considerations would have on a defendant's right to bring collateral proceedings and to appeal from the adverse decision of a district court would clearly be improper. See e.g., North Carolina v. Pearce,[12] 395 U.S. 711, 724-6 (1969); United States v. Jackson, 390 U.S. 570, 581 (1968); Griffin v. California, 380 U.S. 609 (1965); Johnson v. Avery, 393 U.S. 483

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[12]The chilling effect would be the same whether the Court relied on the defendant's exercise of his rights to justify an increase in sentence, as in Pearce, or to justify reimposition of the same sentence despite a reduction in charges, as in the present proceeding.

(1969); United States v. McCoy, 429 F.2d 739, 743 (D. C. Cir. 1970).

B. Judge Cooper's misstatement of the law regarding the scope of this sentencing discretion.

It is established law that a Judge, in resentencing, cannot increase the sentence originally imposed unless information has come to the Judge's attention since the original sentencing which would justify such an increase. North Carolina v. Pearce, supra. At the resentencing proceeding in the present case, Judge Cooper stated:

> I'm not bound by any sentence heretofore imposed in Count 3. I can give the maximum if I choose to in the light of what has been brought to my attention since the appearance of the defendant.
>
> (23)

Since the original sentencing proceeding, appellant had not committed any crimes or engaged in any conduct that would justify such increase. Indeed, the only evidence on the record was that appellant's prison record was exemplary, and that in fact, he had recently saved the life of a fellow inmate. Thus, the only activity by the appellant which had been "brought to [Judge Cooper's] attention since the appearance of the defendant [at the original sentencing proceeding]"[13] which the Judge had indicated that

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[13] Appellant's prior record and the cited portions of the presentence report had of course been in the possession of the district court at the original sentencing proceeding.

he considered to be an adverse sentencing factor was appellant's §2255 application, an application which the Judge had repeatedly termed a fraud.

For Judge Cooper to consider that application as an adverse sentencing factor was clearly improper (See Point A, supra). For the Judge to threaten to increase appellant Seiller's sentence because of that application was even more egregious. North Carolina v. Pearce, supra

Moreover, the fact that Judge Cooper did not increase the sentence, but rather reimposed the same three years of imprisonment does not dissipate this impropriety. Given that two of the three convictions on which that original sentence had been imposed had now been vacated, it was reasonable to expect the Judge to reduce the sentence imposed. See e.g., McGee v. United States, 462 F.2d 243, 247 (2d Cir. 1972). In the context of the above-quoted threat, Judge Cooper's refusal to do so was further evidence of his animosity toward appellant and the prejudice resulting from his improper consideration of appellant's §2255 application as an adverse sentencing factor.

C. The district court's consideration of the pleas which this Court had held to be invalid.

The district court, in accusing appellant Seiller of perpetuating a fraud in order to get his guilty pleas set aside, clearly indicated that it believed that appellant

was in fact guilty of those charges. (See Point A, supra). This impropriety was further compounded when Judge Cooper indicated that he would take his belief as to appellant Seiller's guilty of those charges into consideration in imposing sentence on the remaining count:

> . . . and so while I have set aside your plea in the two counts, there is nothing now that I come to sentence you on the third count to prevent me from recognizing a not guilty plea to two other counts and the additional information that I have which came from your lips before with regard to those two counts in connection with which two counts you have entered a plea of not guilty.
>
> (17)

Although a sentencing court may consider a defendant's prior criminal record, it may not consider prior invalid convictions. See e.g., United States v. Tucker, 404 U.S. 443 (1972). Moreover, although a judge at sentencing may consider incriminating information as to charges on which a defendant has not been tried (See e.g., United States v. Cifarelli, 401 F.2d 512, 514 (2d Cir.), cert. denied, 393 U.S. 987 (1968)) or even incriminating information relating to a charge on which a defendant has been acquitted (See e.g. United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972)), in this case the Judge had received no incriminating information "from [appellant's] lips" as to the vacated counts. Rather, as this Court held in setting aside the two guilty pleas, the only information coming from appellant concerning those charges constituted a declaration that he did not know of the illegal nature of the securities transactions and was

therefore innocent of those charges. Thus, for Judge Cooper to state that he would rely on those statements as adverse sentencing factors constituted further evidence that the sentence imposed was based on invalid considerations. Indeed, despite this Court's finding to the contrary, Judge Cooper tenaciously adhered to his belief that appellant had incriminated himself concerning the vacated counts at the original plea proceeding. Therefore, the Judge felt justified in punishing appellant for that presumed guilt by reimposing the same sentence on the remaining count.

D. Judge Cooper's hostility toward appellant Seiller.

Although the cold transcript falls far short of conveying the degree of animosity which Judge Cooper demonstrated toward the appellant during the resentencing proceeding, certain statements are indicative of that acrimony. Thus, Judge Cooper repeatedly assailed the appellant with derogatory names such as "Mr. Fraud," "Mr. Operator," "a veritable Kreuger," and "a fraud, a manipulator, a faker, a conniver." Furthermore, in pursuing his theory that appellant Seiller had perpetuated a fraud on the Court by challenging his guilty pleas, Judge Cooper repeatedly accused appellant of having regarded the Judge as mentally deficient:

> . . . you felt that the Judge was an imbecile, unaware, and that you could use me and put upon me the way you have so many people and gotten away with it.
>
> (15)
>
> * * *
>
> I am afraid that's where you led yourself off the sensible path, Mister.

> You thought that just because I didn't give you line for line everything that was operating in my mind with regard to you that therefore you had fooled me. (18)

Other statements by the Judge were simply insulting to the appellant, as when he accused the defendant of being "diabolical" or of lacking in human sympathy:

> I did not [respond to appellant's claims of innocence] at sentencing for for the reasons I have already assigned. Something you really would not understand. And that is sympathy. (15)
>
> * * *
>
> I am quite positive that if under the same circumstances our positions were reversed, Seiller, you would in sentencing, give the maximum in the light of all that's been recited, but the fact that you don't understand sympathy doesn't deter me from exercising it. The fact that you don't appreciate or evaluate these attributes of higher civilized deportment shouldn't make any impression upon me and it doesn't. (25-6)

Indeed, Judge Cooper even made a point of citing isolated statements which the appellant had made which were critical of this country, as if the lack of appropriate patriotism were a relevant sentencing factor. Thus, in one of his letters to Judge Cooper, appellant Seiller stated, "I want to leave this country of false slogans and with people I am unable to understand" (25). Concerning this comment, Judge Cooper remarked:

> He had a right to say it but to say that this doesn't sum up his attitude toward the country that gave him asylum

> is to close one's eyes and I don't intend to do it . . . And in another place, his condescension, the habit he has of waving aside as of small consequence, according to his superior intellect, what is presented to him. He made a similar comment with regard to America.
>
> (25)

These repeated outbursts of excessive emotion were clearly inconsistent with the Judge's serious responsibilities in determining the appropriate sentence.[14]

Judge Cooper also repeatedly castigated appellant Seiller for failing to express remorse:

> In the letter already marked in evidence, the detailed letter by the

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[14]The fact that Judge Cooper had lost the ability dispassionately to carry out his responsibilities in this case was also demonstrated at another point in the proceedings when the Judge accused appellant of "snickering":

> Let me tell the defendant in plain language that when a judge -- wipe that snicker off your face, Mister, it doesn't do you any good and it isn't becoming and I detect it. It is the reaction of these smart-alecky fellows that are clever. I have seen it over and over again. Just wipe it off and just listen, because I think I have got your number. You are not going to deter me by your snicker.
>
> (17)

It is indeed unlikely that appellant, who had spent the last two years attempting to have his sentence reduced or set aside, would "snicker" at the Judge who was in the process of determining whether all of the appellant's efforts would produce any real benefit for him. Indeed, given the emotional excesses which Judge Cooper demonstrated throughout the resentencing proceeding, it is highly possible that the "snicker" was imagined rather than real. In either event, the Judge's emotional reaction to what he believed he saw is one more example of the judge's inability to exercise his sentencing discretion in a responsible fashion.

> defendant, there isn't even an avowal, to say nothing or a word or a phrase or a sentence of contrition. Not at all. Nothing.
>
> (15)
>
> * * *
>
> I am not dealing with someone who has offended the law and who comes in and asks for forgiveness and goes through an overwhelming recital or demonstration of contrition with the enormity of his offense and willing to make amends -- "help me" -- we have no such person here.
>
> (16)
>
> * * *
>
> The point I am emphasizing is that ever since we dealt with this defendant on the prior occasion, not a single word has come from him in which he has shown contrition even with respect to what he did as to the count in connection which which we are now about to impose sentence.
>
> (22)

Indeed, contrary to Judge Cooper's claim, appellant Seiller had expressed remorse at the commencement of his original sentencing proceeding, stating:

> What I did wrong I am sorry for. The only thing I can say -- I can give you assurances there will be no repetition.
>
> (Transcript of March 21, 1973 at 3)

Moreover, the failure to express remorse, like the failure to plead guilty or to admit guilt after conviction is not a factor which can be considered against the defendant in sentencing. United States v. Hopkins, 464 F.2d 816, 822 (D.C. Cir. 1972) (failure to express remorse); Scott v. United States, 419

F.2d 264, 267, 269 (D. C. Cir. 1969) (failure to plead guilty and failure to express remorse); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) (failure to admit guilt after conviction); United States v. Rodriguez, 498 F.2d 302 (5th Cir. 1974).

Finally, the judge's hostility toward appellant Seiller was again demonstrated when, after the reimposition of the three year sentence, the Government moved to dismiss the two remaining counts. Rather than granting this motion, as is perfunctorily done in such cases, the Court "reserved" decision. Since the Government itself had requested dismissal of those counts, there was no just reason for refusing to do so. As of the date of the filing of this brief, Judge Cooper has still not decided the Government's motion to dismiss those counts.

Conclusion

Sentencing is one of the most important moments for a defendant involved in a criminal proceeding. At that stage, the defendant is entitled to a sentence imposed by an impartial judge on the basis of a full and dispassionate consideration of the relevant factors.

The record of the resentencing proceeding below establishes that appellant Seiller was denied such consideration. Rather, Judge Cooper repeatedly demonstrated that his emotional involvement in the case and his personal animosity toward appellant Seiller prevented him from exercising the proper judicial discretion in imposing sentence. As the Ninth Circuit found in a similar case:

> [The judge's] surrender to the desire to speak [his] mind . . . suggests that the capacity for discriminating judgment in other respects may also have been lacking . . . This judicial act has been tainted by the manner of its performance. That the sentiments expressed would be widely shared, if not applauded, is no justification. A lecture of this sort in our view is an abuse of judicial authority. It has no place in the sentencing process.
>
> Sentence on both counts is vacated.
>
> (United States v. Duhart, supra, 496 F.2d at 946)

In the present proceeding, Judge Cooper, the district judge who had initially accepted appellant's guilty pleas, and who had twice rejected his challenges to those pleas was the same judge who was assigned the responsibility of resentencing in the aftermath of this Court's partial reversal of his decision. The infection of judicial bias in such a setting, although not inevitable, is at least a danger against which this Court should remain vigilant. In the present proceeding, the trial judge's references to the appellant's prior record and his consideration of the suggestion that the sen-

tence include a provision for voluntary deportation were commendably proper. Unfortunately, the record also clearly documents the fact that the trial judge's hostility toward the appellant and his consideration of improper factors fatally tainted the proceeding. As this and other circuits have wisely noted in remanding for resentencing in analogous circumstances:

> [I]t is difficult for a judge, having once made up his mind, to resentence a defendant, and both for the judge's sake, and the appearance of justice, we remand this case to be redrawn. Mawson v. United States, 463 F.2d 29, [31] (1st Cir. 1972).
>
> (United States v. Rosner, 485 F.2d 1213, 1231 (2d Cir. 1973))

See also United States v. Looney, 501 F.2d 1039, 1042 (4th Cir. 1974).

This Court is clearly authorized to set aside the sentence in this case as a violation of appellant's constitutional due process and fair trial rights and his right against self-incrimination (See e.g., North Carolina v. Pearce, supra; United States v. Jackson, supra); as an abuse of the district court's sentencing discretion (See e.g., United States v. Duhart, supra; McGee v. United States, supra); or in the interests of justice as an exercise of this Court's supervisory power over the district courts in this Circuit. See e.g., Thomas v. United States, supra. See also McNabb v. United States, 318 U.S. 332, 340, 347 (1943); Fay v. New York, 332 U.S. 261, 287 (1947). In light of what transpired below, it should do so here.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE SENTENCE SHOULD BE SET ASIDE AND THE CASE REMANDED TO A DIFFERENT DISTRICT COURT JUDGE FOR RESENTENCING.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
Attorneys for Appellant
JOSEPH SEILLER
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG

Of Counsel

New York, New York
August 25, 1976

CERTIFICATE OF SERVICE

Aug. 26, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Michael Young (KS)